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Indenture Trustee*

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re:

PG&E CORPORATION,

- and -

**PACIFIC GAS AND ELECTRIC
COMPANY,**

Debtors.

- ☐ Affects PG&E Corporation
☐ Affects Pacific Gas and Electric
Company
☒ Affects both Debtors
** All papers shall be filed in the Lead
Case, No. 19-30088 (DM).*

Case No. 19-30088 (DM)

Chapter 11

(Lead Case)

(Jointly Administered)

**LIMITED OBJECTION OF BOKF, NA AS
INDENTURE TRUSTEE TO
CONFIRMATION OF DEBTORS' AND
SHAREHOLDER PROPONENTS' JOINT
CHAPTER 11 PLAN OF
REORGANIZATION DATED MARCH 16,
2020**

Hearing

Date: May 27, 2020

Time: 10:00 a.m. (PT)

Place: Courtroom 17

450 Golden Gate Ave, 16th Floor
San Francisco, CA 94102

Objection Deadline: May 15, 2020, at 4 p.m. (PT)

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11 U.S.C. § 50213

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11 U.S.C. § 1124(2)(A)17

11 U.S.C. § 1129(a)(7)16

15 U.S.C. § 77bbb13

Cal Civ. Code § 171714

Trust Indenture Act of 193912

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5 Collier on Bankruptcy § 553.03[1][i] (15th ed.)13

1 BOKF, NA, in its capacity as successor indenture trustee (the “Senior Notes Trustee”)
2 under the Indentures dated as of (i) April 22, 2005 Supplementing, Amending and Restating the
3 Indenture of Mortgage Dated March 11, 2004 (the “2005 Indenture”); (ii) November 29, 2017
4 (the “2017 Indenture”); and (iii) August 6, 2018, each as supplemented or amended (the “2018
5 Indenture” and collectively, the “Senior Notes Indentures”), pursuant to which Pacific Gas and
6 Electric Company (the “Utility” or, together PG&E Corporation, the “Debtors”) issued the senior
7 notes (the “Senior Notes”), by and through its counsel, Arent Fox LLP, hereby objects on a
8 limited basis to confirmation of the *Debtors’ and Shareholder Proponents’ Joint Chapter 11*
9 *Plan of Reorganization Dated March 16, 2020* [Docket No. 6320] (the “Plan”).¹ In support of its
10 limited objection, the Senior Notes Trustee states as follows:

11 **PRELIMINARY STATEMENT**

12 The Senior Notes Trustee generally supports confirmation of the Plan and applauds the
13 Debtors’ and key stakeholders’ efforts in building consensus and enabling the Debtors to emerge
14 from bankruptcy. The Plan represents a significant achievement in extraordinarily complex
15 cases that affect parties well beyond typical stakeholders in chapter 11 proceedings. It has taken
16 good faith negotiations among the Debtors and their stakeholders to reach this point. The Senior
17 Notes Trustee has worked with the Debtors to resolve its issues with the Plan and has done so
18 with the one exception raised in this Limited Objection in connection with the Senior Notes
19 Trustee’s direct claim for fees, expenses, costs, and other disbursements and indemnities
20 incurred in performing its duties and obligations (the “Trustee Fees”). So long as the Plan is
21 modified to comply with the Debtors’ obligations under the Senior Notes Indentures to satisfy
22 the Trustee Fees, the Senior Notes Trustee is prepared to fully support the Plan.

23 The Trustee Fees are a direct contractual claim of the Senior Notes Trustee against the
24 Utility, separate from the Utility’s obligation to noteholders, and an ongoing and administrative
25 obligation of the Utility under each of the Senior Notes Indentures and section 503(b) of the
26 Bankruptcy Code. And yet despite the Debtors’ solvency and agreement to pay certain of the six

27 ¹ Capitalized terms used, but not defined, herein shall have the meanings ascribed to them in the Disclosure
28 Statement or in the *Debtors’ and Shareholder Proponents’ Joint Chapter 11 Plan of Reorganization dated January*
31, 2020 [Docket No. 5590] (the “Plan”), as applicable.

1 Funded Debt Trustees' fee claims, their Plan fails to satisfy the full extent of the Debtors'
2 obligations to the Senior Notes Trustee. In fact, the Senior Notes Trustee is not receiving any
3 payment under the Plan on account of certain Trustee Fees comprising its claim.

4 Several independent bases require the Debtors to satisfy in full the Trustee Fees in order
5 to confirm the Plan. Each independent basis individually requires payment by the Debtors. On
6 the other hand, there is no basis for failing to make payment on account of these claims.

7 *First*, the Trustee Fees constitute administrative expense claims that must be paid in full.
8 The Senior Notes Indentures expressly provide that such Trustee Fees incurred postpetition are
9 administrative expenses. This makes sense and, indeed, such fees are regularly paid separately
10 from holders' funded debt claims in chapter 11 cases. The Senior Notes Indentures remain in
11 full force and effect postpetition and can only be cancelled or modified pursuant to a plan under
12 § 1123(a)(5)(F) of the Bankruptcy Code. There is essentially no other provision in the Code that
13 enables a debtor to modify or terminate an indenture. As a result, the Debtors have a continuing
14 obligation to pay the Senior Notes Trustee for the Trustee Fees incurred in furtherance of, and in
15 accordance with, its obligations, duties and responsibilities under the Senior Notes Indentures
16 and applicable law.

17 *Second*, even if the Trustee Fees are unsecured claims under the Senior Notes Indentures,
18 applicable Ninth Circuit law requires they be satisfied. Without satisfaction in full, the Senior
19 Notes Trustee will be impaired under the Plan. Because the Trustee Fees are direct claims of the
20 Senior Notes Trustee against the Utility, the Debtors cannot shift liability to the noteholders
21 without the Senior Notes Trustee's consent. The Debtors' Plan, however, improperly does just
22 that – it attempts to shift liability to certain noteholders by forcing the Senior Notes Trustee to
23 assert its charging lien against distributions to holders. The charging lien though, is a backstop
24 for the Trustee's benefit, not a tool for the Debtors to avoid contractual obligations. It appears
25 the Debtors intend to rely on the Noteholder RSA's silence about the payment of Trustee Fees as
26 justification for abdicating their direct contractual responsibilities to the Senior Notes Trustee.
27 But the Senior Notes Trustee is not a signatory or party to the Noteholder RSA.² In any event,

28 ² The Senior Notes Indentures only permit holders to issue two types of directives to the Senior Notes Trustee. See

1 the Debtors and the subset of noteholders who executed the Noteholder RSA cannot waive the
2 Senior Notes Trustee's rights against the Debtors, nor can they modify, amend, or waive the
3 payment provisions of the Senior Notes Indentures. In fact, the Noteholder RSA does not
4 purport to do any of these things. It is simply silent, which cannot form a basis for the Debtors'
5 failure to pay the Trustee Fees.³

6 *Third*, the Debtors must satisfy the Trustee Fees before they can reinstate the Senior
7 Notes. The Plan reinstates all Senior Notes under the 2017 and 2018 Indenture and reinstates 15
8 of the 25 series of Senior Notes issued under the 2005 Indenture. Sections 1123(d) and 1124(2)
9 of Bankruptcy Code, as well as binding Ninth Circuit precedent, require the Debtors to cure all
10 defaults under the Senior Notes Indentures as a condition to reinstatement. The Debtors do not
11 dispute they must satisfy all Trustee Fees incurred pursuant to the 2017 and 2018 Indentures in
12 order to accomplish "reinstatement" within that term's meaning under the Plan, the Bankruptcy
13 Code, and binding Ninth Circuit law. The dispute arises from the Debtors' contention that they
14 are not required to satisfy a portion of the Trustee Fees incurred under the 2005 Indenture
15 because they are only reinstating 15 of the 25 series of Senior Notes issued thereunder.

16 The Debtors' contention is incorrect and appears to be based on a misunderstanding of
17 how the 2005 Indenture works. The 2005 Indenture provides that the Trustee Fees are incurred
18 pursuant to the Indenture itself and are not broken down by individual series of Senior Notes.
19 The Utility's obligations under the 2005 Indenture are incorporated into each Senior Note issued
20 thereunder. As such, no Senior Note issued under the 2005 Indenture may be reinstated without
21 curing the outstanding Trustee Fees incurred in connection with the 2005 Indenture. Regardless
22 of whether the Trustee Fees are administrative expenses or unsecured claims, the Utility must
23 pay them in full under the Plan in order to reinstate the Senior Notes under the 2005 Indenture.

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26 2005 Indenture, § 9.12. Neither encompasses or authorizes holders to direct the Senior Notes Trustee to waive its
27 direct contractual claim against the Utility for Trustee Fees.

28 ³ To the extent the Court determines the Senior Notes Indentures have been modified under the Plan such that the
Debtors are relieved from direct payment of the Trustee Fees, the Senior Notes Trustee will seek to satisfy its claim
for Trustee Fees by asserting its charging lien against distributions to holders.

1 For each of these reasons, and although the Senior Notes Trustee otherwise supports
2 confirmation, the Debtors cannot confirm the proposed Plan without fully satisfying the Senior
3 Notes Trustee's claims. Accordingly, the Senior Notes Trustee objects to confirmation of the
4 Plan to the extent it fails to provide for satisfaction in full of the Trustee Fees.

5 **BACKGROUND**

6 **A. Senior Notes Indentures**

7 The Utility issued 29 series of Senior Notes representing an aggregate principal amount
8 as of the Petition Date of more than \$17.5 billion, excluding interest, fees, and other charges
9 (such as the Trustee Fees). The Senior Notes were issued pursuant to three Senior Notes
10 Indentures. Each of the Senior Notes Indentures remains in full force and effect and can only be
11 canceled or modified pursuant to the terms of the Senior Notes Indentures or under a plan
12 pursuant to section 1123(a)(5)(F) of the Bankruptcy Code. The Senior Notes Trustee is
13 obligated to perform its statutory and contractual responsibilities under each of the Senior Notes
14 Indentures. In such capacity, the Senior Notes Trustee incurred and continues to incur Trustee
15 Fees in furtherance of and in accordance with, its obligations, duties and responsibilities under
16 the Senior Notes Indentures, California law, and New York law, as applicable.

17 Section 10.07 of each of the Senior Notes Indentures requires the Utility to reimburse the
18 Senior Notes Trustee for the Trustee Fees, which consist of reasonable fees, costs, expenses, and
19 other disbursements, including those incurred to its counsel, financial advisors and other agents
20 and professionals, and to indemnify the Senior Notes Trustee against any loss, liability or
21 expense. The Trustee Fees are the Utility's direct obligations to the Senior Notes Trustee,
22 separate and distinct from the Utility's obligations to holders of the Senior Notes and survive
23 termination of the Senior Notes Indentures. The Senior Notes Indentures also provide that
24 Trustee Fees incurred following the Utility's bankruptcy filing are intended to constitute
25 administrative expenses under the Bankruptcy Code. A true and correct copy of the 2005
26 Indenture is attached hereto as **Exhibit A**. True and correct copies of the 29 Supplemental
27 Indentures issued under the 2005 Indenture are attached as **Exhibits A-1** through **A-29**.⁴

28 _____
⁴ The 2017 and 2018 Indentures have substantially the same language.

1 In addition, each of the Senior Notes Indentures provides for (i) contractual priority of
2 payment of the Trustee Fees on all distributions made on account of the Senior Notes, also
3 known as a “charging lien,” and (ii) procedures and mechanics for all distributions, which
4 require that all distributions on account of the Senior Notes be made directly through the Senior
5 Notes Trustee unless it consents otherwise in writing. See 2005 Indenture, §§ 9.03, 9.04, 9.05,
6 10.07. Put simply, the Senior Notes Indentures permit but do not require the Senior Notes
7 Trustee to assert its charging lien against distributions to satisfy the Trustee Fees to the extent not
8 paid directly by the Utility. That choice belongs to the Senior Notes Trustee—not the Debtors or
9 noteholders.

10 **B. Proposed Plan Treatment of Senior Notes**

11 The Plan classifies the Senior Note claims in three separate classes each receiving
12 different treatment:

- 13 • Class 3B-I – “Utility Impaired Senior Note Claims” will receive payment of
14 accrued pre- and post-petition interest plus New Utility Long-Term Notes in the
15 amount of such holder’s principal amount as of the Petition Date. Holders of
16 Utility Impaired Senior Note Claims are **Impaired** and thus entitled to vote.⁵
- 17 • Class 3B-II – “Utility Reinstated Senior Note Claims” will be Reinstated in
18 accordance with section 1124 of the Bankruptcy Code. Holders of Utility
19 Reinstated Senior Note Claims are **Unimpaired** and thus are deemed to accept the
20 Plan and are not entitled to vote.⁶

21 ⁵ Class 3B-I includes all Claims under the following Senior Notes and corresponding Senior Notes Indentures: (a)
22 3.50% Senior Notes due October 1, 2020, issued under the 2005 Indenture; (b) 4.25% Senior Notes due May 15,
23 2021, issued under the 2005 Indenture; (c) 3.25% Senior Notes due September 15, 2021, issued under the 2005
24 Indenture; (d) 2.45% Senior Notes due August 15, 2022, issued under the 2005 Indenture. Plan, §§ 1.246, 1.254.

25 ⁶ Class 3B-II includes all Claims under the following Senior Notes and corresponding Senior Notes Indentures: (e)
26 3.25% Senior Notes due June 15, 2023, issued under the 2005 Indenture; (f) 4.25% Senior Notes due August 1, 2023,
27 issued under the 2018 Indenture; (g) 3.85% Senior Notes due November 15, 2023, issued under the 2005 Indenture;
28 (h) 3.75% Senior Notes due February 15, 2024, issued under the 2005 Indenture; (i) 3.40% Senior Notes due August
1, 2024, issued under the 2005 Indenture; (j) 3.50% Senior Notes due June 15, 2025, issued under the 2005
Indenture; (k) 2.95% Senior Notes due March 1, 2026, issued under the 2005 Indenture; (l) 3.30% Senior Notes due
March 15, 2027, issued under the 2005 Indenture; (m) 3.30% Senior Notes due December 1, 2027, issued under the
2017 Indenture; (n) 4.65% Senior Notes due August 1, 2028, issued under the 2018 Indenture; (t) 4.50% Senior
Notes due December 15, 2041, issued under the 2005 Indenture; (u) 4.45% Senior Notes due April 15, 2042, issued
under the 2005 Indenture; (v) 3.75% Senior Notes due August 15, 2042, issued under the 2005 Indenture; (w) 4.60%
Senior Notes due June 15, 2043, issued under the 2005 Indenture; (y) 4.75% Senior Notes due February 15, 2044,
issued under the 2005 Indenture; (z) 4.30% Senior Notes due March 15, 2045, issued under the 2005 Indenture; (aa)
4.25% Senior Notes due March 15, 2046, issued under the 2005 Indenture; (bb) 4.00% Senior Notes due December
1, 2046, issued under the 2005 Indenture; (cc) 3.95% Senior Notes due December 1, 2047, issued under the 2017

- Class 3B-III – “Utility Short-Term Senior Note Claims” will receive payment of accrued pre- and post-petition interest plus New Utility Short-Term Notes in the amount of such holder’s principal amount as of the Petition Date. Holders of Utility Short-Term Senior Note Claims are **Impaired** and thus entitled to vote.⁷

Plan, §§ 4.18-4.20.

The Plan’s classification and treatment of Senior Note claims is the result of the Restructuring Support Agreement between the Plan Proponents and certain holders of Senior Notes (the “Noteholder RSA”),⁸ whereby certain Consenting Noteholders (as defined in the Noteholder RSA) agreed to such treatment. The Senior Notes Trustee did not participate in the Noteholder RSA negotiations nor is the Senior Notes Trustee a signatory or a party to the Noteholder RSA. The Noteholder RSA does not address the payment or non-payment of the Trustee Fees; nor does it contain any provision modifying, amending, or waiving the payment provisions of the Senior Notes Indentures (nor could it).

C. Proposed Plan Treatment of Trustee Fees

The Senior Notes Trustee requested that the Plan expressly provide for full payment of all Trustee Fees separate and apart from the underlying Senior Notes claims (whether as an administrative expense claim or otherwise), which is customary in chapter 11 plans restructuring significant funded debt. The Plan Proponents have declined to do so, instead taking the view that treatment of the Trustee Fees should vary depending on the treatment of the various Senior Notes claims. The Plan appears to accomplish this by spreading the treatment of the Trustee Fees (though not expressly) among three classes of Claims: Class 3B-1 (Utility Impaired Senior Note

Indenture. Plan, §§ 1.240, 1.246.

⁷ Class 3B-III includes all Claims under the following Senior Notes and corresponding Senior Notes Indentures: (o) 6.05% Senior Notes due 2034, issued under the 2005 Indenture; (p) 5.80% Senior Notes due March 1, 2037, issued under the 2005 Indenture; (q) 6.35% Senior Notes due February 15, 2038, issued under the 2005 Indenture; (r) 6.25% Senior Notes due March 1, 2039, issued under the 2005 Indenture; (s) 5.40% Senior Notes due January 15, 2040, issued under the 2005 Indenture; (x) 5.125% Senior Notes due November 15, 2043, issued under the 2005 Indenture. Plan, §§ 1.229, 1.246.

⁸ See *Debtors’ Motion Pursuant to 11 U.S.C. §§ 363(b) and 105(a) and Fed. R. Bank. P. 6004 and 9019 for Entry of an Order (I) Approving and Authorizing the Debtors to Enter Into Restructuring Support Agreement with Consenting Noteholders and Shareholder Proponents, and (II) Granting Related Relief* [Docket No. 5519]; *Order Pursuant to 11 U.S.C. Sections 363(b) and 105(a) and Fed. R. Bankr. P. 6004 and 9019 (I) Approving and Authorizing the Debtors to Enter Into Restructuring Support Agreement With Consenting Noteholders and Shareholder Proponents, and (II) Granting Related Relief* [Docket No. 5637].

1 Claims), Class 3B-II (Utility Reinstated Senior Note Claims), and Class 3B-III (Utility Short-
2 Term Senior Note Claims). Because Class 3B-II Claims are Reinstated, the Plan requires full
3 satisfaction of Trustee Fees that are (in the Plan Proponents' view) associated with such claims,
4 which includes all Trustee Fees arising under the 2017 and 2018 Indentures, as well as 15 of the
5 25 series of Senior Notes issued under the 2005 Indenture. The Plan Proponents do not dispute
6 this requirement. In contrast, the Plan Proponents would not provide for any payment of Trustee
7 Fees that the Plan purports to designate as Class 3B-I or 3B-III Claims, which consist of the
8 remaining 10 series of Senior Notes issued under the 2005 Indenture. The Plan also states that
9 the Senior Notes Trustee shall not be released from any duty or responsibility under or arising
10 from the Utility Reinstated Senior Notes Documents. Plan § 6.13.

11 **OBJECTION**

12 **I. The Trustee Fees Are Administrative Expenses and Must Be Paid in Full to Satisfy** 13 **the Requirements of Confirmation.**

14 The Trustee Fees constitute administrative expenses of these estates. The Senior Notes
15 Trustee is required to fulfill its statutory and contractual duties and obligations during these cases
16 while the Senior Notes Indentures remain in full force and effect. The Senior Notes Trustee's
17 performance of these necessary duties on behalf of the Debtors' largest creditor was entirely
18 consistent with the purpose of administrative expense priority and the well-settled public policies
19 underlying indentures, which are designed to equip trustees with the ability to protect public
20 investors by assigning the expenses of compliance to the issuer and to have a single voice acting
21 on behalf of all holders. This is not just a benefit to holders but to debtor-issuers as well. Thus,
22 the Senior Notes Indentures expressly provide that fees incurred in connection with such services
23 during a chapter 11 case of the Utility are administrative expenses.⁹

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26 ⁹ Specifically, the Senior Notes Indentures provide that when the Senior Notes Trustee "incurs expenses or renders
27 services in connection with an Event of Default specified in . . . Section 9.01(e), the expenses (including the
28 reasonable charges and expenses of its counsel) and the compensation for the services are intended to constitute
expenses of administration under any applicable federal or state bankruptcy, insolvency or other similar law." 2005
Indenture, § 10.07 (emphasis supplied). Section 9.01(e), in turn, refers to the filing of a voluntary bankruptcy case.

1 Section 503(b)(1)(A) of the Bankruptcy Code permits payment of administrative
2 expenses for “the actual, necessary costs and expenses of preserving the estate.” This includes
3 payment for postpetition services, particularly where the debtor has agreed to treat such services
4 as administrative expenses. See In re RB Furniture, Inc., 92 F.3d 1193 (9th Cir. 1996)
5 (unpublished); In re Monarch Capital Corp., 163 B.R. 899, 907 (Bankr. D. Mass. 1994) (“all that
6 [claimant] need establish to recover the value of its services is that it rendered postpetition
7 services pursuant to its prepetition contract, without objection by the Trustee, and that the
8 services had value to the estate”); In re Payless Cashways, Inc., 305 B.R. 303, 308 (Bankr. W.D.
9 Mo. 2004) (service provider entitled to reasonable value of services rendered postpetition prior to
10 contract rejection). The burden on the claimant is to show that the conduct involved a
11 postpetition attempt to preserve the estate for the “benefit of its creditors.” In re Sierra Pacific
12 Broadcasters, 185 B.R. 575, 579 (B.A.P. 9th Cir. 1995). That standard is easily met here.

13 Throughout these cases, the Senior Notes Trustee has represented the interests of the
14 holders of more than \$17 billion of Senior Notes—*i.e.*, the largest creditor of the estate. But the
15 Senior Notes Trustee has provided those services and taken such actions not only for the benefit
16 of holders, but also for the purposes underlying the requirements of an indenture trustee. The
17 Senior Notes Trustee incurred fees and expenses in performing these postpetition services
18 pursuant to the Senior Notes Indentures, which remain operative unless and until the Debtors
19 confirm a plan modifying the Senior Notes Indenture under section 1123(a)(5)(F) of the
20 Bankruptcy Code. The Utility bears the cost of such services as postpetition administrative
21 expenses pursuant to sections 503(b) and 507(a)(2) of the Bankruptcy Code.

22 Notably, the Senior Notes Indentures’ expense reimbursement provisions comport with
23 the policy underpinnings of trust indenture law. Indenture trustees are charged with enforcing
24 their constituent holders’ rights and remedies under applicable law and the indenture. An
25 indenture trustee is the collective voice of the holders. The Trust Indenture Act of 1939 (the
26 “TIA”) recognized “the national public interest and the interest of investors in notes, bonds,
27 debentures, evidences of indebtedness and certificates of interest or participation therein which
28 are offered to the public, are adversely affected . . . when the trustee does not have adequate right

1 and power, or adequate duties and responsibilities, in connection with matters relating to the
2 protection and enforcement of the rights of such investors . . . [and] when the trustee does not
3 have resources commensurate with its responsibilities” 15 U.S.C. § 77bbb. The TIA
4 therefore established certain duties and responsibilities for trustees, who may, in turn, hold the
5 issuer responsible for fees and expenses incurred in discharging those duties and responsibilities.

6 The Senior Notes Indentures incorporate the TIA’s duties and responsibilities. The
7 Senior Notes Trustee performed these duties and responsibilities on behalf of holders of all
8 Senior Notes throughout these chapter 11 cases and will continue to do so unless and until the
9 Senior Notes Indentures are terminated and the Trustee is discharged. The Senior Notes Trustee
10 was charged with exercising the holders’ rights and remedies and served as the collective voice
11 for all holders. Absent the Senior Notes Trustee, the Debtors would have had to deal with
12 hundreds if not thousands of holders appearing or exercising remedies individually. It is
13 common for chapter 11 plans restructuring significant funded debt to satisfy the fees and
14 expenses of indenture trustees separate and apart from the underlying bond debt, whether by
15 classifying and treating such claim as an administrative expense claim or simply as a payment
16 under a confirmed plan. See, e.g., In re Claire’s Stores, Inc., 18-10584 (Bankr. D. Del) (Doc.
17 1040, Exh. A, p. 44); In re Cenveo, Inc., No. 18-22179 (Bankr. S.D.N.Y) (Doc. 685, Exh. A, pp.
18 38-39); In re 21st Century Oncology Holdings, Inc., No. 17-22770 (Bankr. S.D.N.Y.) (Doc. 915,
19 Exh. 1, p. 47). The same should be done here.

20 **II. The Trustee Fees Are Direct Liabilities of the Utility that Must Be Satisfied in Full.**

21 **A. The Senior Notes Trustee has Valid Claims for Trustee Fees Under Each**
22 **Indenture.**

23 Even if the Trustee Fees are not treated as administrative expenses, it is settled law in the
24 Ninth Circuit that a claim for postpetition attorneys’ fees and other expenses, incurred pursuant
25 to a prepetition contract, is allowable under § 502 of the Bankruptcy Code so long as it satisfied
26 the underlying contractual requirements and applicable state law. See In re SNTL Corp., 571
27 F.3d 826 (9th Cir. 2009) (“SNTL II”). Accord In re Adams, No. 18-60051, 2020 WL 1873365
28 (9th Cir. Apr. 15, 2020). See generally 5 Collier on Bankruptcy § 553.03[1][i] (15th ed.) (“if the

1 creditor incurs the attorneys' fees postpetition in connection with exercising or protecting a
2 prepetition claim that included a right to recover attorneys' fees, the fees will be prepetition in
3 nature, constituting a contingent prepetition obligation that became fixed postpetition when the
4 fees were incurred").

5 In SNTL II, the Ninth Circuit affirmed and adopted in its entirety the opinion of the
6 Bankruptcy Appellate Panel ("the BAP") in In re SNTL Corp., 380 B.R. 204 (9th Cir. BAP
7 2007) ("SNTL I"). In SNTL I, the estate representative objected to an unsecured creditor's claim
8 for postpetition attorneys' fees and other expenses on various grounds, all of which amounted to
9 a position that unsecured claims may not include a claim for postpetition expenses. The
10 Bankruptcy Court agreed and sustained the objection. The BAP reversed, holding that
11 "attorneys' fees arising out of a prepetition contract but incurred postpetition fall within the
12 Bankruptcy Code's broad definition of claim." Id. at 221. In so holding, the BAP relied on
13 caselaw standing for the proposition that an "indenture trustee had a 'right of payment' for
14 attorneys' fees under prepetition contract, and thus had an allowable unsecured claim under
15 section 502(b) even though such fees were unknown as of the petition date." Id. (In re Flight
16 Transp. Corp. Securities Litigation, 874 F.2d 576 (8th Cir. 1989)).

17 Here, the Senior Notes Trustee's claim for Trustee Fees satisfies the prevailing Ninth
18 Circuit standard for payment of postpetition fees and other expenses under a prepetition contract.
19 The Senior Notes Indentures expressly authorize and require the Senior Notes Trustee to
20 continue to undertake its obligations after and in connection with the Debtors' chapter 11 filings.
21 The Senior Notes Indentures also require the Utility to reimburse the Senior Notes Trustee for its
22 reasonable expenses, including attorneys' fees, incurred in connection with that undertaking.

23 Further, the Senior Notes Trustee's claims for such expenses is consistent with the
24 underlying state law governing the Senior Notes Indentures. The 2005 Indenture, with which the
25 Debtors are refusing to comply, is governed by California law. As recognized in SNTL I,
26 "'applicable' California law permits recovery of contractual attorneys' fees only if they are
27 reasonable. See CAL. CIV. CODE § 1717." SNTL I, 380 B.R. at 219 n. 17. The 2005 Indenture
28 likewise limits the Utility's exposure to "reasonable" attorneys' fees and therefore complies with

1 California law. Moreover, the Ninth Circuit has upheld fee shifting provisions under trust
2 indentures in particular as consistent with California law. See Finisar Corp. v. U.S. Bank Tr.
3 Nat. Ass'n, 391 F. App'x 657, 658 (9th Cir. 2010). Accordingly, the Senior Notes Trustee has a
4 valid claim for Trustee Fees under the Senior Notes Indentures.

5 **B. The Senior Notes Trustee's Direct Claim Should be Unimpaired and Satisfied**
6 **in Full Under the Plan.**

7 The Plan requires the payment of Trustee Fees in connection with its treatment of Class
8 3B-II (the "Utility Reinstated Notes Claims") but omits such payment in its treatment of Classes
9 3B-I and 3B-III (respectively, the "Utility Impaired Senior Notes Claims" and the "Utility Short-
10 Term Senior Notes Claims"). Plan, §§ 4.18-4.20. Instead, the Plan proposes to satisfy Class 3B-
11 I Claims with "Cash equal to their Utility Impaired Senior Note Claim Interest Amount and
12 equal amounts of each issue of the New Utility Long-Term Notes in an aggregate amount equal
13 to such holder's Utility Impaired Senior Note Claim Principal Amount"; and Class 3B-III Claims
14 with "Cash equal to their Utility Short-Term Senior Note Claim Interest Amount and equal
15 amounts of each issue of New Utility Short-Term Notes in an aggregate amount equal to such
16 holder's Utility Short-Term Senior Note Claim Principal Amount." These amounts exclude the
17 Trustee Fees, which means the Debtors are providing \$0.00 on account of the Senior Notes
18 Trustee's direct claims and requiring the Trustee to assert the alternative charging lien against
19 distributions to noteholders, thereby diluting recoveries and creating a more cumbersome
20 process. The charging lien, however, is between the Senior Notes Trustee and the noteholders
21 for the benefit of the Trustee. It serves as a backstop in the event the Utility does not pay the
22 Trustee—and the Utility has no basis for withholding such payment.

23 The Plan Proponents assert in the Disclosure Statement that they "disagree" with the
24 Senior Notes Trustee's contention that it is entitled to direct payment of its Trustee Fees as part
25 of its Class 3B-I and Class 3B-III claims.¹⁰ This "disagreement" lacks justification. The Debtors
26 cannot contend that they are somehow insulated from a direct obligation to satisfy the Trustee
27

28 ¹⁰ See Disclosure Statement for Debtors' and Shareholder Proponents' Joint Chapter 11 Plan of Reorganization
[Docket No. 6322], p. 23 n. 5.

1 Fees in full, including indemnity claims that may continue to accrue post-distribution, by virtue
2 of the Noteholder RSA or the votes of Classes 3B-I and 3B-III. Fundamentally, other parties
3 have no ability or right to waive or modify the Senior Notes Trustee's direct claim for Trustee
4 Fees. The Senior Notes Trustee was neither involved in nor a signatory to the Noteholder RSA.
5 As such, the Noteholder RSA could not and did not modify the Utility's contractual obligation to
6 pay the Senior Notes Trustee's claim for postpetition Trustee Fees. Nor can the Senior Notes
7 Indentures be altered postpetition except under a confirmed plan pursuant to section
8 1123(a)(5)(F) of the Bankruptcy Code. The Debtors' Plan must provide for the treatment of the
9 direct claim for Trustee Fees and, in view of their purported solvency, that treatment must be
10 satisfaction in full.

11 The Plan does not provide for payment of the Senior Notes Trustee's valid claims for
12 Trustee Fees to the extent such claims appear to be classified as Class 3B-I or Class 3B-III
13 Claims. Yet, the Plan does provide for payment in full of: (a) the Trustee Fees apparently placed
14 in Class 3B-II; (b) the claims of certain other Funded Debt Trustees; and (c) all "General
15 Unsecured Claims" (defined to exclude the Trustee Fees). There is no basis for treating Trustee
16 Fees positioned in Class 3B-I and Class 3B-III any differently than these other classes of claims
17 of a similar nature—particularly those in Class 3B-II that arise under the same contract (the 2005
18 Indenture) and are being paid in full.¹¹

19
20 **III. The Trustee Fees Incurred Under the 2005 Indenture Must Be Paid in Full as a**
21 **Condition of Reinstatement of Senior Notes Issued Under that Indenture.**

22 The Debtors are not only obligated to satisfy the Senior Notes Trustee its Trustee Fees as
23 a direct claim, the Debtors are also required pay all Trustee Fees incurred pursuant to the Senior

24 ¹¹ If the Court finds that the Senior Notes Trustee's direct claims are properly classified in Class 3B-I and Class 3B-
25 III, then the Debtors are providing the Senior Notes Trustee \$0.00 on account of its direct claims for Trustee Fees.
26 The Senior Notes Trustee has neither voted nor accepted the Plan, and the Debtors would be required to satisfy the
27 "best interests" test under §1129(a)(7) of the Bankruptcy Code. The Debtors have not provided a liquidation analysis
28 demonstrating compliance with the "best interests" test as to the Senior Notes Trustee and, moreover, the Debtors
have repeatedly stated throughout these proceedings that they are capable of paying creditors in full. As such, the
Senior Notes Trustee is confident that a chapter 7 liquidation would result in the payment of Trustee Fees
significantly greater than zero, which is the treatment now proposed for Classes 3B-I and 3B-III.

1 Notes Indentures as a condition to reinstating the Senior Notes. The Plan proposes to reinstate
2 all Senior Notes issued under 2017 and 2018 Indentures, as well as 15 of the 25 series of Senior
3 Notes issued under the 2005 Indenture, rendering the holders of such Senior Notes unimpaired
4 pursuant to section 1124(2) of the Bankruptcy Code. By extension, the Plan provides that the
5 Senior Notes Trustee shall not be released from any duty or responsibility under or arising from
6 the Utility Reinstated Senior Note Documents Plan § 6.13. In order to satisfy the requirements
7 of section 1124(2), the Plan must, among other things, “**cure all defaults** that occurred both
8 before and **after** the commencement of the case.” See 11 U.S.C. § 1124(2)(A) (emphasis
9 supplied).

10 The concept of “cure” is of primary importance here and its meaning is firmly established
11 by the Bankruptcy Code and Ninth Circuit precedent. Simply put: “the amount necessary to [a]
12 default shall be determined in accordance with the underlying agreement and applicable
13 nonbankruptcy law.” 11 U.S.C. § 1123(d). In In re New Investments, Inc., 840 F.3d 1137, 1139
14 (9th Cir. 2016), the Ninth Circuit held definitively that the requirements of section 1123(d) are
15 incorporated into section 1124(2) and, as such, a debtor may not reinstate a loan to its pre-default
16 status without curing all late charges, attorneys’ fees, and other pre- and post-default obligations
17 arising under terms of the loan agreement, so long as those terms are consistent with state law.

18 Here, the Debtors do not dispute that they must pay all Trustee Fees arising under the
19 2017 and 2018 Indentures as a condition to reinstating the Senior Notes. Nor do the Debtors
20 dispute they are liable for at least a portion of the Trustee Fees arising under the 2005 Indenture
21 as a condition to reinstating 15 of the 25 series of Senior Notes issued thereunder. Rather, the
22 Debtors seem to dispute some unknown and unquantified portion of the Trustee Fees they believe
23 are attributable to the 10 series of Senior Notes that are not being reinstated. The Debtors
24 misconceive the relationship between the Senior Notes Indentures and the Senior Notes they seek
25 to reinstate.

26 Each of the Utility Reinstated Senior Notes issued pursuant to the 2005 Indenture provides
27 that such Senior Notes are “Bonds within the meaning of the Indenture” and that such Indenture
28 describes the “respective rights, limitations of rights, duties and immunities of the Company, the

1 Trustee and the Holders of Bonds thereunder and . . . the terms and conditions upon Bonds are,
2 and are to be, authenticated and delivered.” See, e.g., Exhibit A-16, pp. A-2, A-6 (Form of 4.50%
3 Senior Note Due December 15, 2041). Further, each of such Senior Notes provides that
4 “acceptance of this Senior Note shall be deemed to constitute the consent and agreement by the
5 Holder hereof to all of the terms and provisions of the Indenture.” Id. The 2005 Indenture
6 provides, in turn, that it shall govern the Bonds issued thereunder.

7 Pursuant to the express terms of the 2005 Indenture and the Senior Notes issued
8 thereunder, these covenants of the Utility to pay Trustee Fees and indemnify the Senior Notes
9 Trustee are incorporated into each of the Senior Notes. In other words, each Senior Note includes
10 a covenant of the Utility to pay all Trustee Fees incurred by the Trustee in administering the
11 Senior Notes Indenture.

12 There is no basis in the Senior Notes, Senior Notes Indentures, or otherwise, for the
13 Debtors to divide Trustee Fees by Senior Note. Indeed, such a division is incompatible with the
14 administration of the Senior Notes and Senior Notes Indentures and, moreover, makes little sense
15 because expenses are in the first instance a unitary liability of the Utility under each Senior Notes
16 Indenture. Indenture trustees have a duty to protect the rights of noteholders evenhandedly,
17 including the right to be paid in accordance with the terms of the indenture. As a result,
18 administration and enforcement occur on an indenture-by-indenture basis rather than a note-by-
19 note basis. See Dell'Oca v. Bank of New York Tr. Co., 159 Cal. App. 4th 531, 537 (2008)
20 (“indenture trustee is more like a stakeholder whose duties and obligations are exclusively
21 defined by the terms of the indenture agreement”). This benefits all parties to an indenture not
22 only by ensuring egalitarian treatment but also by reducing expenses through administrative
23 efficiency.

24 The upshot is that in theory, practice, fact, and as a matter of law, the Utility is responsible
25 for the Trustee Fees and may not reap the benefits of section 1124(2) of the Bankruptcy Code
26 without paying the Trustee Fees in full.

1 **CONCLUSION**

2 For the reasons stated above, the Senior Notes Trustee is entitled to full satisfaction of the
3 Trustee Fees whether as (i) administrative expense claims; (ii) a direct unsecured claim against
4 the estates of the solvent Debtors; or (iii) a predicate to reinstatement. To the extent the Plan
5 fails to provide for such payment, it may not be confirmed in its present form. Accordingly, the
6 Senior Notes Trustee objects to the confirmation of the Debtors' Plan and requests that such
7 confirmation be denied *without prejudice* unless and until the Debtors revise the Plan to provide
8 for satisfaction in full of the Trustee Fees. Once the Plan is modified as provided herein, the
9 Senior Notes Trustee will fully support confirmation.

10
11 Dated: May 15, 2020

ARENT FOX LLP

12 By: /s/ Aram Ordubegian

13 Aram Ordubegian (SBN 185142)

14 Andrew I. Silfen (*pro hac vice*)

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15 *Counsel for BOKF, NA, solely in its capacity as*
16 *Indenture Trustee*